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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-86

In the Matter of

Amendment of Section 73.202(b),	RM-8497
Table of Allotments,	RM-8548
FM Broadcast Stations.	
(Klamath Falls, Altamont and Butte	
Falls, Oregon, and Dorris, California) ¹	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 29, 1995;

Released: July 10, 1995

By the Chief, Allocations Branch

1. At the request of Terry A. Cowan ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 3584 (1994), proposing the allotment of Channel 284C1 to Klamath Falls, Oregon, as the community's fourth local FM service. Counterproposals were filed by Western States Broadcasting, Inc. ("WSB"), and Goldrush Broadcasting ("Goldrush").² Comments were filed by the petitioner reiterating his intention to apply for the channel at Klamath Falls, if allotted. Reply comments were filed by the petitioner, WSB,³ KMED Radio ("KMED") and DRB Medford License, Inc. ("DRB Medford").

2. WSB is the permittee of Station KCHQ(FM), Channel 249C1, Altamont, Oregon. In its counterproposal, it requests that Station KCHQ(FM)'s construction permit be modified to specify Butte Falls as the station's community of license and that its operating frequency be downgraded from Channel 249C1 to Channel 249C2. WSB states that the change of community would serve the public interest since it would provide a first local aural service to Butte Falls and enable Station KCHQ(FM) to bring a new service to approximately 175,000 people. WSB argues that, in contrast, the allotment of Channel 284C1 to Klamath Falls

only would provide the community with its fourth local FM and seventh aural service and bring a new service to approximately 56,000 people. Acknowledging that the deletion of Channel 294C1 from Altamont would result in the deletion of the community's sole local aural service, WSB requests that Channel 284C1 be allotted to Altamont as a replacement for Channel 249C1 and states its intention to apply for the channel, if allotted to Altamont.

3. In opposition, petitioner submits that WSB's counterproposal cannot be considered as *bona fide* but rather an abuse of the Commission's processes. Petitioner points out that WSB is the licensee of Station KWSA(AM), West Klamath Falls, and permittee of Station KCHQ(FM), Altamont. However, pursuant to the request of WSB stating that it is experiencing both "severe financial problems" and "equipment problems,"⁴ the Commission has permitted both of these stations to be silent for many months. Further, petitioner states that although WSB petitioned for, and in 1992 was granted, the modification of Station KCHQ(FM)'s construction permit to operate on Channel 249C1 in lieu of Channel 267C, WSB has yet to file a construction permit specifying the new channel and facilities.⁵ The petitioner states that in order for WSB to pursue the Altamont and Butte Falls stations, it must pay a Form 301 filing fee of \$2,335 for each allotment, plus many thousands of dollars for the construction of towers, purchase or lease of transmitter sites, purchase or lease of studios, as well as purchase or lease of equipment such as transmitters, antennas and studio equipment. In the case of the Butte Falls allotment, WSB would also be required to pay a rule making fee of \$1,800. Since WSB has stated that it is experiencing continuing financial difficulties of such an extent that it cannot return either of the stations it is already authorized to operate on the air, petitioner argues that its statement of intent to file applications for Channels 249C2 at Butte Falls and 284C1 at Klamath Falls must be viewed as "patently unreliable."⁶

4. Petitioner also disputes the need of Butte Falls for a local radio service. He states that Butte Falls has a 1990 U.S. Census population of only 252 persons and is little more than a crossroads. As to Altamont, petitioner states that the U.S. Census considers Altamont to be a CDP with a 1990 population approximately the same as Klamath Falls. However, he appends a letter from the Klamath County Chamber of Commerce which states that Altamont has no post office or governmental structure of its own and, in fact, is referred to today as the "South Suburbs" by local residents.

¹ The communities of Altamont and Butte Falls, Oregon, and Dorris, California, have been added to the caption.

² Public Notice of the filing of WSB's counterproposal was given on November 18, 1994, Report No. 2041. Goldrush's counterproposal to allot Channel 284C3 to Dorris, California, is late-filed and therefore not accepted for consideration.

³ After the time for filing comments and reply comments, WSB filed a Response to the petitioner's reply comments. Petitioner filed a Motion to Strike WSB's Response as an unauthorized pleading. The Commission generally does not accept for consideration pleadings submitted after the deadline for filing reply comments. However, where, as here, a counterproposal is put on public notice, the Commission considers this to be an extension of the reply comment period. See, *Corinth, Hadley and Queensbury, NY*, 2 FCC Rcd 3316 (1987). Therefore,

since these comments are timely filed pursuant to the response time set forth in the public notice announcing WSB's counterproposal, we will consider WSB's Response to petitioner's reply comments.

⁴ See Letter of July 29, 1994, from William L. Zawila, President, Western States Broadcasting, Inc.

⁵ See MM Docket 91-341, 7 FCC Rcd 4599 (1992). Although WSB had requested the substitution of Channel 243C1 for Channel 267C, the Commission allotted Channel 249C1 to accommodate other proposed allotments. However, Channel 249C1 was allotted at the reference coordinates proposed by WSB.

⁶ The latest request of WSB for Stations KWSA(AM) and KCHQ(FM) to remain off-the-air was filed with the Commission on February 6, 1995.

5. Finally, petitioner submits that both requests can be accommodated if the Commission does not reject WSB's counterproposal. He states that there is no technical bar to the allotment of Channel 249C2 at Butte Falls and Channel 284C1 at Klamath Falls. However, Channel 284C1 cannot be allotted to both Altamont and Klamath Falls as the communities are located only approximately 5 kilometers apart. However, petitioner contends that the Commission, in this case, can delete Channel 249C1 from Altamont without replacement. He notes the Commission's prohibition against the removal of a community's sole local broadcast service but argues that in this case the relevant community from which Station KCHQ(FM) is being removed is Klamath Falls, not Altamont, even if the Commission should find that Altamont is a separate and independent place. In support, petitioner states that in *Huntington Broadcasting Co. v. FCC*, 192 F. 2d 33 (D.C. Cir. 1951), the court affirmed the Commission's finding that one community did not deserve a Section 307(b) preference over another where the facilities proposed by each prospective licensee were so powerful that the service would be regional in character and would substantially cover the entire metropolitan area in which both cities were located. In this case, petitioner states that since a Class C1 channel allotted to either Altamont or Klamath Falls would serve substantially the same wide area, the relevant community is Klamath Falls, the center of the metropolitan area, and not the suburb of Altamont. Petitioner contends that WSB would not be harmed if Channel 284C1 is allotted to Klamath Falls instead of Altamont since it will be able to apply for the channel.

6. KMED, licensee of Station KMED(AM), Gold Hill, Oregon, opposes the allotment of Channel 249C2 to Butte Falls. It states that since the community has a population of only approximately 425 persons,⁷ the station will primarily serve populations outside the city in other areas of Jackson County. KMED states that if Channel 249C2 is allotted to Butte Falls, it will constitute the fourth new FM allotment to Jackson County in the past three years. However, Jackson County, with a population of 153,000 persons, already receives service from 10 commercial FM, 2 noncommercial FM, 6 commercial AM and 2 noncommercial AM stations, for a total of 19 radio stations. In addition, there are two allotments which are not yet on the air, thus raising the total to 21 services. KMED states that AM stations in small markets like Jackson County can only survive by programming a niche format since they cannot compete with FM stations on signal quality. However, with the addition of so many FM stations, KMED contends that both AM and FM stations have difficulty in finding a niche. It argues that the addition of another FM station will come at the "expense of the already battered AM operators" which is not in the public interest.

7. DRB Medford, licensee of Stations KROG(FM), Phoenix, Oregon, and KBOY(FM), Medford, Oregon, also opposes WSB's counterproposal. DRB Medford disputes WSB's claim that its proposal to allot Channel 249C2 to Butte Falls and modify Station KCHQ(FM)'s construction permit to specify Butte Falls in lieu of Altamont as its community of license complies with the Commission's Rules. It states that WSB's proposal would result in the removal of Altamont's sole local broadcast service in con-

travention of the Commission's decision in *Modification of FM and TV Authorizations to Specify a New Community of License ("Modification R&O")*, 4 FCC Rcd 4870 (1989) ("*Modification MO&O*"), 5 FCC Rcd 7094 (1990). WSB states that the Commission, in the *Modification MO&O*, said that the public has a "legitimate expectation" that they will continue to receive existing service and thus only in "rare circumstances" would a waiver of this presumption be considered. Further, DRB Medford states, the Commission went on to say that the provision of a new local service would not be, by itself, sufficient justification to warrant the removal of an existing service, particularly the only authorized service to the community. DRB Medford also points out the Commission statement that the replacement of an operating station with a vacant allotment or unconstructed permit, although a factor to be considered, did not adequately cure the disruption to existing service occasioned by the removal of an existing service.

8. DRB Medford characterizes WSB's proposal as disregarding the public interest rights of Altamont to retain its existing authorization for local service. It states that Altamont is the largest community in Klamath County and the largest community in Oregon outside of a metropolitan area to have only one local radio station. DRB Medford points out that there is no hard and fast rule to apply in determining whether a particular population grouping constitutes a community for allotment purposes, citing *Declaratory Ruling Concerning the Meaning and Effect of Section 73.642 (a)(3)*, 55 FCC 2d 187, 189 (1975). While acknowledging that Butte Falls is incorporated, DRB Medford contends that its status as a community for allotment purposes is ambiguous, stating that it clearly does not have the characteristics of a bona fide community. First, it states that Butte Falls is a small community with a declining population, having gone from a high in population of 428 persons in 1980 to a low of 252 persons in 1990, according to the U.S. Census. Further, it states that WSB, other than noting that Butte Falls is incorporated, provides no data demonstrating that Butte Falls has the characteristics which might otherwise qualify it as a community for allotment purposes, only stating that the allotment would provide a new service to 175,000 persons. Since this population figure is representative of the population within the Medford Standard Metropolitan Statistical Area ("SMSA"), DRB Medford contends that WSB's real purpose is to provide a eighth Class C facility to the Medford-Jackson County radio market.

9. DRB Medford argues that the Commission cannot consider the allotment at Butte Falls to be a first local service in light of the policies set forth in *RKO General (KERC)*, 5 FCC Rcd 3222 (1990) and *Faye and Richard Fack*, 3 FCC Rcd 5375 (1990). It states that these cases hold that where the suburban station would provide service to a metropolitan area and the population of the suburban community is relatively small, it is within the urbanized area and exhibits a high degree of interdependence with the central city, the Commission is generally disinclined to grant a first local service preference to the suburban community. Here, Butte Falls is located within the Medford Urbanized Area and has a population of 252 persons while that of Medford itself is almost 47,000 persons. DRB Medford goes on to point out that the population of Altamont, the largest community in Klamath County, is 18,591 per-

⁷ No source for the population figure is given.

sons. It states that WSB ignores the disparity in the populations, provides no justification for the deletion of the only presently authorized service to Altamont and fails to point out that Butte Falls receives service from no less than eight AM and nine FM stations.

10. Like the petitioner, DRB Medford also contends that WSB's statement of intent to file for the Butte Falls and Altamont allotments cannot be considered as *bona fide* based on the performance of WSB or its controlling principal, William Zawila, in at least four instances. DRB Medford states that WSB was issued a construction permit in 1988 for an Altamont Class C facility specifying 100 kW power at 882 feet above average terrain. However, when WSB sought to have the facility licensed in 1991, DRB Medford states that the Commission found the station to be operating illegally with reduced power and with an unauthorized booster station. Subsequently, in 1991, WSB petitioned for and was granted a change of channel to permit the station to relocate to Chase Mountain to improve coverage. However, to date no application to effectuate this change has been filed. According to DRB Medford, construction permits have also been issued to companies which Zawila controls for stations at Coalinga, California (KNGS(FM)), Templeton, California (KXER(AM)), and Earlimart, California (KNKD(FM)) but that none of these stations have built.⁸ WSB's commitment to apply for the Butte Falls/Altamont channels is further undercut, according to DRB Medford, by WSB's statement that it cannot return Stations KWSA and KCHQ(FM) to operation due to continuing "severe financial" problems. DRB Medford believes that there is little likelihood that WSB will overcome its financial difficulties, stating that electrical power has been cut off to its studios, equipment apparently repossessed and personal property taxes in excess of \$12,000 unpaid since July 1992.

11. WSB, in response to petitioner's opposition, again states that the counterproposal better serves the public interest since it would provide a first local aural transmission service to Butte Falls while retaining a Class C1 service at Altamont as opposed to the provision of a seventh local aural transmission service at Klamath Falls. WSB acknowledges that it is presently experiencing financial difficulties but argues that this fact is irrelevant to this proceeding, contending that the counterproposal fully complies with the Commission's allotment policies and rules. It argues that petitioner is erroneously assuming that because WSB has financial difficulties at this time that it will continue to have such problems in the future. As to whether Butte Falls and Altamont are deserving of FM allotments, WSB states that Butte Falls is an incorporated city with its own "local governmental structure and a clearly identifiable population group in the State of Oregon" and that the Commission has already recognized the existence of Altamont with the licensing of Station KCHQ(FM) to that community.

DISCUSSION

12. After careful review of the pleadings before us, we find that the public interest would not be served by the grant of WSB's counterproposal. WSB seeks to change Station KCHQ(FM)'s community of license from Altamont

to Butte Falls by deleting the only local service from Altamont, a community of 18,591 persons, to provide a first local service to Butte Falls, a community of only 252 persons.⁹ WSB also proposes to allot Channel 284C1 to Altamont, as a replacement for Altamont's present Channel 249C1, and states its intention to apply for the replacement channel.

13. We will first deal with the change of community portion of WSB's counterproposal. In the *Change of Community R&O*, the Commission prohibited the removal of a community's sole local broadcast service. However, this statement was modified in the *Change of Community MO&O* by stating that, although believing the prohibition to be justified, we would consider a waiver of this ban in the "rare circumstances" where removal of a local service might serve the public interest by, for example, providing a first reception service to a significantly sized population. In this case, WSB has only stated that the relicensing of Altamont's sole station to Butte Falls would provide the extremely small community with its first local aural service and provide an additional service to approximately 175,000 persons. No showing is provided that demonstrates that the Butte Falls allotment would provide any first or second aural reception service or even that service to any underserved area (less than five reception services) would be provided. Further, based on the information before us, we cannot find that the allotment of Channel 249C2 to Butte Falls would constitute a first local aural service under the criteria set forth in cases, where, as here, the allotment is requested for a community within an Urbanized Area. See *Bay City, Texas, et al.*, MM Docket 89-459, 8 FCC Rcd 1552 (1993), *recon. den.* 9 FCC Rcd 130 (1994); *Eatonon and Sandy Springs, Georgia, et al.*, 6 FCC Rcd 6580 (1991), *recon. pending*. Butte Falls, and its county, Jackson, is located within the Medford Urbanized Area. With Medford itself having three FM and three AM stations licensed to the community, the allotment of Channel 249C2 to Butte Falls can be considered as no less than a seventh local aural service and, according to KMED, would be a twenty-second service within Jackson County.

14. We recognize that WSB proposes to replace Channel 249C1 at Altamont with Channel 284C1 which it states it would apply for. However, as the Commission has stated:

"We specifically wish to clarify that replacement of an operating station with a vacant allotment or unconstructed permit, although a factor to be considered in favor of the proposal, does not adequately cure the disruption to existing service occasioned by removal of an operating station. From the public's perspective, the potential for service at some unspecified future date is a poor substitute for the signal of an operating station that can be accessed today simply by turning on a TV or radio set."

See *Change of Community MO&O* at 7097. We recognize that Station KCHQ(FM) is presently off-the-air and thus the removal of the channel would not be as disruptive as if the station were presently operating. However, Station KCHQ(FM) was in operation for several years and we believe it is correct to find that the community is entitled

⁸ The construction permit for Station KXER(AM), Templeton, CA, has been cancelled.

⁹ Population figures are taken from the 1990 U.S. Census.

to a reasonable expectation that service will be resumed at an earlier date by the already constructed and once operating Station KCHQ(FM) than by a new station which must first go through the administrative processes to receive a construction permit and then the actual construction of a new station. Therefore, we find that WSB has not provided a sufficiently compelling public interest justification for the removal of Altamont's only authorized local service.

15. We are also unable to conclude that, even if Station KCHQ(FM) were not Altamont's sole local broadcast service, the public interest would be served by the reallocation of an existing station to Butte Falls. First, while there is a presumption that places which are incorporated or listed in the U.S. Census are communities for allotment purposes, this presumption may be rebutted. Here, the opponents have questioned the status of Butte Falls as a community for allotment purposes but the petitioner has provided no community information beyond stating that it is incorporated and has its own local government. WSB also states that Butte Falls is a "clearly identifiable population group" but provides no specific information as to the social, economic, cultural or governmental indicia which would demonstrate that it is a community for allotment purposes.

16. Finally, although we have denied WSB's counterproposal on grounds unrelated to whether its expression of interest should be considered as *bona fide*, we also cannot find that WSB's expression of interest to be acceptable. We do not question that at some time in the future WSB may indeed be able to resolve its financial problems. However, as the licensee or permittee of at least five stations, none of which are on the air due to problems which include financial ones, we cannot find that WSB would be able to follow through on its promise to promptly apply for and construct another station. In addition, we question whether WSB would indeed apply for Channel 284C1 at Altamont, if allotted as it has proposed. WSB opposed the allotment of Channel 284C1 to Altamont when proposed in MM Docket 91-341, having stated that the terrain between the transmitter site area and the community is hilly and thus the station could not provide Altamont with an adequate signal. See 7 FCC Rcd 4599 (1992). Therefore, even though our engineering review shows that the proposals before us can be accommodated by allotting Channel 284C1 to Klamath Falls, Channel 249C2 to Butte Falls, if found to be a community for allotment purposes, and the substitution of Channel 235C1 for Channel 249C1 at Altamont, with the modification of Station KCHQ(FM)'s construction permit to specify the alternate Altamont channel, we decline to do so.¹⁰

Technical Summary

17. We believe the public interest would be served by allotting Channel 284C1 to Klamath Falls as the community's fourth local FM service since an interest has been expressed in providing the community with an additional local transmission service. Channel 284C1 can be allotted to Klamath Falls in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.¹¹

18. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 24, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Klamath Falls,	223C, 258C1,
Oregon	284C1, 295C1

19. The window period for filing applications will open on **August 24, 1995**, and close on **September 25, 1995**.

20. IT IS FURTHER ORDERED, That the counterproposal filed by Western States Broadcasting, Inc. (RM-8548), to substitute Channel 249C2 for Channel 249C1 at Altamont, OR, reallocate Channel 249C2 to Butte Falls, OR, modify Station KCHQ(FM)'s construction permit to specify Butte Falls as its community of license and allot Channel 284C1 to Altamont IS DENIED.

21. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

22. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

¹⁰ Since WSB has committed itself to applying for the alternate Class C1 channel which it has proposed for Altamont, it must still desire to remain an Altamont broadcaster. Therefore, we believe that WSB would not be disadvantaged by opening a

filing window for the Butte Falls channel instead of the Altamont channel.

¹¹ The coordinates for Channel 284C1 at Klamath Falls are 42-12-56 North Latitude and 121-47-56 West Longitude.